A **AKLIANSYAH**

v.

PP

B COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
ABDUL AZIZ RAHIM JCA
TENGKU MAIMUN JCA
[CRIMINAL APPEAL NO: B-05-289-11-2012]
C 4 FEBRUARY 2014

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 1,965 grams methamphetamine - Appeal against conviction and sentence - Drugs found in boot of car - Knowledge of drugs -* D *Whether evidence of prosecution fell short of proving knowledge - Whether there was gap in prosecution's case - Totality of evidence - Whether considered by trial judge - Whether prosecution's case considered in its entirety - Whether accused an innocent carrier - Failure to view evidence from all angles - Whether trial judge erred in decision - Involvement of* E *third party - Whether trial judge failed to appreciate defence - Whether appellate interference warranted*

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Trafficking in 1,965 grams methamphetamine - Drugs found* F *in boot of car - Knowledge of drugs - Whether evidence of prosecution fell short of proving knowledge - Whether there was gap in prosecution's case - Totality of evidence - Whether considered by trial judge - Whether prosecution's case considered in its entirety - Whether accused an innocent carrier - Failure to view evidence from all angles - Whether trial judge* G *erred in decision - Involvement of third party - Whether trial judge failed to appreciate defence - Whether appellate interference warranted*

The accused ('the appellant') was convicted and sentenced by the High Court for trafficking in 1,965 grams of methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 H ('DDA'). The prosecution's case was that the appellant was found with the dangerous drugs when he opened the boot of a Volvo car ('the car') and took out a paper bag containing the said drugs. However, the defence case was that the appellant went to the place of incident to meet one Cheok Kok Wah ('CKW') to seek I employment as an assistant mechanic. Before he left, CKW

requested the appellant to bring a bag from the boot of the car at the parking area and to hand it over to him near the autopay machine at P2. The appellant obliged to the request. After reaching the car, the appellant opened the door at the driver's side to look for the lever to open the boot but was unable to find it. He then opened the said boot with the key given to him by CKW and found a paper bag in it but before he could take it, the police ('SP2') had arrested him. The appellant told the police that the bag belonged to CKW and he was asked to bring the bag. The trial judge found the appellant guilty and held, *inter alia*, that (i) the appellant had possession of the impugned drugs; and (ii) the appellant knew about the drugs in the paper bag. Dissatisfied, the appellant appealed to this court. The issues that arose were: (i) the non-calling of the owner of the car left a gap in the prosecution's case; (ii) the trial judge did not consider the totality of the evidence and failed to view it from all angles; (iii) the prosecution had failed to rebut the defence case that it was CKW who was the real trafficker; and (iv) the trial judge failed to consider that CKW was detained under the Dangerous Drugs (Special Preventive Measures) Act 1985 ('DDSPM') for drug related activities. The main issue for consideration *vide* this appeal was whether the learned trial judge had committed an error in failing to consider the prosecution's case in its entirety and in finding a *prima facie* case against the appellant.

Held (allowing appeal; setting aside conviction and sentence) Per Balia Yusof Wahi JCA delivering the judgment of the court:

(1) Issues regarding the owner of the car and the person by the name of CKW were raised by the appellant during the prosecution's case itself. During cross-examination, SP2 agreed with the suggestion from the defence that the appellant had told him it was CKW who had requested the appellant to collect the paper bag from the boot of the car. The trial judge erred in her decision when she ruled that it was a mere suggestion from the defence and was not evidence. When SP2 agreed to the question posed to him, the answer given to the same was evidence. It was established through evidence from the prosecution itself that the appellant was told to pick the bag from the boot of the car by CKW. (paras 7, 10 & 11)

(2) The trial judge failed to consider the various aspects of the case. These were material facts established in evidence which ought to have been considered by the trial judge. Further, the trial judge had failed to consider the evidence adduced by the prosecution from all angles which merits appellate intervention. Had the trial judge considered the totality of the evidence and viewed it from all angles, the evidence proffered by the prosecution would have fallen short of proving knowledge on the part of the appellant. (paras 12, 15 & 18)

(3) Proof of knowledge was often a matter of inference which varies from case to case. It is trite that when two or more than one inference can be made from a set of facts against an accused person, the court should draw the one most favourable to him. On the facts, the favourable inference that the appellant had no knowledge about the contents of the bag ought to have been drawn. The appellant had picked the bag from the car boot at the behest of CKW. His conduct being 'smooth and without hesitation' as the trial judge found, was more consistent with innocence. (para 19)

(4) A judge hearing the defence need not be unduly concerned about the truth of the defence but must consider whether the defence story was probable and had raised a reasonable doubt on the prosecution's case. The trial judge had failed to appreciate that CKW was not a fictitious person. He was detained under the DDSPM for activities related to drugs. The allegations of fact against him fit very neatly with the time and type of drugs for which the appellant was being charged. Further, the appellant was not at all familiar with the car. He had to search for the lever at the driver's seat to open the boot and could not find any. The appellant's story was, at the very least, probable. (paras 26 & 27)

(5) The appellant was an innocent carrier who had no knowledge about the drugs in the car boot. There were evidence that spoke in favour of the appellant in his defence and those evidence, had it been properly appraised and appreciated by the trial judge, were consistent with the defence of the appellant. The failure of the trial judge to do so was a

misdirection. Further, the trial judge had not appreciated the appellant's core defence that the real trafficker was CKW. (paras 28, 29 & 33)

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh ('perayu') telah disabitkan dan dijatuhkan hukuman di Mahkamah Tinggi atas tuduhan mengedar 1,965 gram methamphetamine, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Kes pihak pendakwaan adalah bahawa perayu telah dijumpai dengan dadah berbahaya apabila dia membuka but sebuah kereta Volvo ('kereta itu') dan mengeluarkan satu beg kertas yang mengandungi dadah tersebut. Walau bagaimanapun, kes pembelaan adalah bahawa perayu telah pergi ke tempat kejadian untuk berjumpa dengan seorang yang bernama Cheok Kok Wah ('CKW') untuk memohon pekerjaan sebagai penolong mekanik. Sebelum perayu meninggalkan tempat tersebut, CKW telah memintanya mengambil sebuah beg dari but kereta itu yang terletak di kawasan tempat letak kereta dan memberinya kepada CKW berdekatan dengan mesin bayar automatik di P2. Perayu mematuhi permintaan tersebut. Setelah sampai ke kereta itu, perayu membuka pintu bahagian pemandu untuk mencari tuil pembuka but tetapi gagal untuk mencarinya. Perayu kemudian membuka but itu dengan menggunakan kunci yang diberi oleh CKW lalu melihat sebuah beg kertas tetapi sebelum dia boleh mengambilnya, pihak polis ('SP2') telah menangkapnya. Perayu memberitahu polis bahawa beg tersebut adalah kepunyaan CKW dan dia diminta untuk membawa beg itu. Hakim bicara mendapati perayu bersalah dan memutuskan, antara lain, bahawa (i) perayu mempunyai milikan dadah tersebut; dan (ii) perayu mempunyai pengetahuan mengenai dadah dalam beg itu. Tidak berpuas hati, perayu merayu ke mahkamah ini. Isu-isu yang dibangkitkan adalah: (i) kegagalan memanggil pemilik kereta itu telah meninggalkan jurang dalam kes pendakwaan; (ii) hakim bicara tidak mempertimbangkan keseluruhan keterangan dan gagal menilainya daripada semua sudut; (iii) pihak pendakwaan gagal mematahkan kes pembelaan bahawa CKW merupakan pengedar yang sebenar; dan (iv) hakim bicara gagal mempertimbangkan bahawa CKW ditahan di bawah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('LLPK') untuk aktiviti-aktiviti berkaitan dengan dadah. Melalui rayuan ini, isu utama yang dibangkitkan untuk pertimbangan adalah bahawa hakim bicara khilaf atas

kegagalan mempertimbangkan kes pihak pendakwaan secara keseluruhannya dan dalam mendapati satu kes *prima facie* terhadap perayu.

Diputuskan (membenarkan rayuan; mengenepikan sabitan dan hukuman)
Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:

(1) Isu-isu berkenaan pemilik kereta itu dan seorang yang bernama CKW telah pun dibangkitkan oleh perayu semasa kes pendakwaan. Semasa pemeriksaan balas, SP2 bersetuju dengan cadangan pembelaan bahawa perayu telah memberitahunya yang CKW telah meminta perayu untuk membawa beg tersebut dari but kereta. Hakim bicara khilaf dalam keputusan beliau apabila memutuskan bahawa ia hanya merupakan satu cadangan dan bukannya keterangan. Apabila SP2 bersetuju dengan soalan yang ditujukan kepadanya, jawapan yang diberi olehnya adalah keterangan. Ini dibuktikan melalui keterangan daripada pihak pendakwaan sendiri bahawa perayu telah diminta untuk membawa beg tersebut dari but kereta itu kepada CKW.

(2) Hakim bicara gagal untuk mempertimbangkan beberapa aspek dalam kes ini. Kesemua ini merupakan fakta-fakta penting yang terbukti melalui keterangan yang sepatutnya dipertimbangkan oleh hakim bicara. Tambahan lagi, hakim bicara gagal untuk mempertimbangkan keterangan yang dikemukakan oleh pihak pendakwaan daripada semua sudut yang mewajarkan campur tangan rayuan. Jika hakim bicara telah mempertimbangkan keseluruhan keterangan dan menelitinya daripada semua sudut, maka keterangan yang dikemukakan oleh pihak pendakwaan akan dilihat sebagai gagal untuk membuktikan pengetahuan perayu.

(3) Bukti pengetahuan merupakan perkara inferens dan berbeza antara satu kes ke kes yang lain. Adalah nyata bahawa apabila terdapatnya dua atau lebih daripada satu inferens yang boleh dibuat daripada fakta-fakta terhadap seorang tertuduh, mahkamah mesti membuat inferens yang memihak kepada tertuduh. Berdasarkan fakta, inferens bahawa perayu tidak mempunyai pengetahuan mengenai kandungan dalam beg itu sepatutnya dibuat. Perayu telah mengambil beg itu dari but

kereta atas permintaan CKW. Tindakan perayu yang 'smooth and without hesitation' seperti yang diputuskan oleh hakim bicara adalah lebih konsisten dengan ketidakbersalahan.

(4) Seorang hakim yang mendengar pembelaan tidak perlu mengambil berat mengenai kebenaran pembelaan itu tetapi mesti mempertimbangkan sama ada versi pembelaan adalah meyakinkan dan membangkitkan keraguan munasabah atas kes pendakwaan. Hakim bicara gagal menghargai bahawa CKW bukanlah seorang yang tidak wujud. CKW ditahan di bawah LLPK bagi aktiviti-aktiviti berkaitan dengan dadah. Tuduhan fakta terhadap CKW adalah selari dengan masa dan jenis dadah yang dipertuduh ke atas perayu dalam kes ini. Tambahan lagi, perayu tidak biasa dengan kereta itu. Dia terpaksa mencari tuil di kawasan tempat duduk pemandu untuk membuka but dan tidak dapat menjumpainya. Versi perayu, sekurang-kurangnya, adalah meyakinkan.

(5) Perayu adalah pembawa tidak bersalah yang tidak mempunyai pengetahuan mengenai dadah dalam but kereta itu. Terdapat keterangan yang memihak kepada perayu dalam pembelaannya dan keterangan tersebut, jika dihargai dan dipertimbangkan oleh hakim bicara, adalah konsisten dengan pembelaan perayu. Kegagalan hakim bicara untuk berbuat demikian adalah satu salah arah. Tambahan, hakim bicara tidak menghargai asas kes pembelaan bahawa CKW merupakan pengedar sebenar.

Case(s) referred to:

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Aedy Osman v. PP [2011] 1 CLJ 273 FC ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
DPP v. Brooks [1974] 2 All ER 840 ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mohamad Abdul Rahman v. PP [2013] 7 CLJ 843 CA ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Badrulsham Baharom [1987] 1 LNS 72 HC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Iskandar Mohamad Yusof [2006] 6 CLJ 379 HC ***(refd)***
PP v. Kasmin bin Soeb [1974] 1 LNS 116 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

A *Tai Chai Keh v. PP [1948] 1 LNS 122 CA* ***(refd)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 CA ***(refd)***
Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA ***(refd)***

Legislation referred to:
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6, 7
B Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a), (2)

For the appellant - Hisyam Teh Poh Teik, M/s Teh Poh Teik & Co
For the prosecution - Nadia Hanim Ahmad Tajuddin, DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-134-2011]
C

Reported by Kumitha Abd Majid

JUDGMENT

D

Balia Yusof Wahi JCA:

[1] The appellant filed an appeal against his conviction and sentence on a charge of trafficking in 1,965g of methamphetamine, an offence under s. 39B(1)(a) and punishable under s. 39B(2) of
E the Dangerous Drugs Act 1952 (the Act).

[2] We allowed his appeal and we now give our reasons.

[3] Briefly, the fact of the case goes as follows:

F

On 22 August 2010 at about 4.15pm, PW2 together with a team of officers had carried out surveillance on a Volvo car parked at the basement parking at the IKEA in Damansara. Soon, the appellant was seen walking towards the car and opened the front
G driver's side of the car door with a remote control key. The appellant was seen opening the door and bending over. He was then seen opening the boot of the car and took out a paper bag. After closing the boot, he was seen leaving the car and immediately PW2 pounded on him. The appellant was still
H clutching the paper bag. PW2 found the paper bag to contain a shoe box containing two transparent plastic packets suspected to be containing drugs. The appellant was arrested and the exhibits were handed over to the investigating officer (PW4). PW5, the Government Chemist certified that the suspected drugs seized
I from the appellant to be 1,965g of methamphetamine.

[4] Before us, learned counsel for the appellant, in the person of Encik Hisyam Teh Poh Teik submitted that the learned trial judge had committed an error in failing to consider the prosecution's case in its entirety to find a *prima facie* case against the appellant. That being the main issue in this appeal.

[5] In finding that the appellant had possession of the impugned drugs, the learned trial judge had found that he was caught red handed. The paper bag was not hidden and that his actions of opening the car door, bending over and subsequently opening the boot taking out the paper bag without any hesitation gave rise to an inference that he knew about the drugs in the bag. The trial judge also found "his actions were smooth and without any hesitation". Invoking the s. 37(da) presumption, the learned trial judge called upon the appellant to enter his defence.

[6] Encik Hisyam submitted that in so finding, the learned trial judge had failed to consider the following factors, namely:

(a) the Volvo car did not belong to the appellant. The owner of the car, one Gan Yau Wen was arrested in the same vicinity on the same day of the incident as he was fleeing from the place.

(b) a person by the name of Cheok Kok Wah (CKW) and a female were also arrested in the same vicinity at the time of the incident.

(c) CKW was detained in Simpang Renggam under the Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 (LLPK) for drug related activities as disclosed from the evidence of SP2 and SP4 and so was Gan Yau Wen who was detained at Sungai Petani.

(d) there is a nexus between CKW, the Volvo car and the paper bag containing the drugs.

(e) the appellant upon his arrest did not even struggle or made any attempt to flee or to even drop the bag.

(f) The non-calling of the owner of the car had left a gap in the prosecution's case. The evidence of the car owner who was known and was also arrested at the same time of the incident could at least have explained about the paper bag in the boot

A and whether the appellant had anything to do or any connection with the same. It could also have explained the lingering doubt as to whether CKW had any connection with the paper bag containing the drugs found in the boot of the Volvo car.

B

[7] The learned trial judge had dismissed all these issues as irrelevant. We disagree with the learned trial judge. These issues about the owner of the car and the person by the name of CKW were raised by the appellant during the prosecution's case itself,
C namely, about the arrest of these two persons at the same vicinity on the same day of the incident.

[8] It was the appellant's defence that on the day in question, he had met up with this person by the name of CKW at Starbucks, Bangunan IKEA as he wanted to get a job in CKW's
D workshop. After having discussed about his employment with CKW and when he was about to leave, CKW requested the appellant to go to the Volvo which was parked at the basement car park to fetch a bag which was in the boot of the Volvo and then hand the bag to CKW. CKW then handed the key and the
E remote control key to the appellant and told the appellant that he would be waiting at the auto pay machine at the parking level P2. The appellant obliged.

[9] The appellant then went to the Volvo, opened the door on
F the driver's side and bent inside to look for the boot lever. He could not find it and closed the door. He then went to the boot, unlocked and opened it. He saw a paper bag inside the boot. At this point of time, the appellant said two men approached him and identified themselves as 'polis'. One of them asked him what he
G wanted to take and the appellant replied that he wanted to take the bag. The appellant was arrested and was handcuffed. The bag was examined and there were two plastic packets containing substances in a shoe box found in the bag. He was shocked. The appellant had told the police that the bag belonged to CKW and
H it was CKW who asked him to fetch the bag. He also told the police about CKW and where he was waiting for the appellant. Based on the information given by the appellant, CKW was arrested.

I

[10] Throughout the prosecution's case, this defence of the appellant was put forward. Principally it was put to the prosecution to indicate that the appellant had no knowledge about the drugs. When SP2 was giving evidence during cross-examination, he agreed with the defence suggestion that the appellant had told him it was CKW who had requested him to collect the paper bag from the boot of the car. The learned trial judge however, in her decision stated that it was a mere suggestion from the defence and not evidence.

[11] We agree with learned counsel that the learned trial judge had erred in so holding. When SP2 agreed to the question posed to him during cross-examination, the answer given to the same is evidence. In other words it was established through evidence from the prosecution itself that the appellant was told to pick the bag from the boot of the car by the said CKW.

[12] We had perused the records and we found that the learned trial judge had failed to consider the various aspects of the case as put forth in the preceding paragraphs of this judgment of ours. We are of the considered view that these are material facts established in evidence which ought to have been considered by the learned trial judge. The learned trial judge had failed, in our view to consider the evidence adduced by the prosecution from all angles. It was incumbent on her part to do so.

[13] We made reference to *Gooi Loo Seng v. PP* [1993] 3 CLJ 1; [1993] 2 MLJ 137 where the Supreme Court observed the following at p. 5 (CLJ); p. 142 (MLJ):

> Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for in the words of Pickford J in *R v. Bundy*: '… the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence'.
>
> We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

[14] This court had an occasion to deal with a similar issue in *Mohamad Abdul Rahman v. PP* (Court of Appeal Criminal Appeal No: T-05-336-12/2011); [2013] 7 CLJ 843 wherein I had stated:

> Taking into consideration the totality of the evidence, we are of the considered view that the learned trial judge had failed to consider that the room where the drugs were found was accessible to others and there was no exclusive custody and control of the drawer by the Appellant. Our perusal of the learned trial judge's grounds of judgment did not indicate that His Lordship had made that consideration. In our view, that evidence is material and failure to consider material evidence does make an error of law is beyond argument. (*Gotham Construction Co v. Amulya Krishna* (1967) AIR Calcutta 91).

[15] We agreed with the submissions of Encik Hisyam that had the learned trial judge considered the totality of the evidence and viewed it from all angles, the evidence proffered by the prosecution fall short of proving knowledge on the part of the appellant. We agree that there was no overt act of the appellant other than "terkejut" and "tergamam" as stated by SP2. But that did not seem to have been considered by the learned trial judge to be against the appellant.

[16] The inference of knowledge was drawn by the learned trial judge in the following manner at p. 108-109 of the rekod rayuan jilid 2:

> Di dalam kes ini, Tertuduh telah ditangkap dengan beg kertas (P14a) yang mengandungi barang kes yang tidak berada dalam keadaan tersorok (hidden). Keadaan ini memberi inferen bahawa Tertuduh tahu berkenaan dadah yang dibawa di dalam beg tersebut.
>
> Tindakan tertuduh yang dilihat oleh SP2 terus menuju ke kereta tersebut, membuka pintu kereta dengan remote control, membongkokkan badan ke dalam kereta tersebut, menutup pintu kereta, membuka boot, mengambil P14(a) dan seterusnya menutup kembali tanpa apa-apa keraguan ('hesitation') memberi irresistible inference yang tertuduh mengetahui beg P14 itu berada di dalam boot tersebut. "His action were smooth without any hesitation".

[17] It was not necessary for the learned trial judge to infer that the appellant knew about the paper bag P14 was in the boot because there is already evidence before her that CKW had told the appellant to pick up a bag from the boot of the car.

[18] We concluded on this issue by expressing our view that this inference drawn by the learned trial judge without considering other material and relevant facts and evidence and without viewing the totality of the prosecution's case from all angles is an error which merits appellate intervention. There was a misdirection and it must stand to correction.

[19] We agree that the evidence about the conduct of the appellant may be viewed either way. (*Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1, *DPP v. Brooks* [1974] 2 All ER 840). There is always the other side of the coin. Proof of knowledge is very often a matter of inference which varies from case to case. (*Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2008] 6 MLJ 19, *Wong Nam Loi v. PP* [1998] 1 CLJ 37, *PP v. Badrulsham Baharom* [1987] 1 LNS 72; [1988] 2 MLJ 585). SP2 as we have stated earlier, had given evidence to say the appellant "terus terkejut dan tergamam" (p. 14 rekod rayuan jilid 1) when SP2 introduced himself as a police officer and held the appellant. This we have said did not matter to the trial judge as nothing was made out of this from her grounds of judgment and on her inference of knowledge. The learned trial judge however was more swayed about the coolness of the appellant in "his actions were smooth without hesitation". Both these conducts of the appellant may be viewed either way and may lead to different inferences being made. It is trite that when two or more than one inference can be made from a set of facts against an accused person, the court should draw the one most favourable to him. (*Tai Chai Keh v. PP* [1948] 1 LNS 122; [1948-1949] MLJ Supp 105, *PP v. Kasmin bin Soeb* [1974] 1 LNS 116; [1974] 1 MLJ 230, *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734, *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 (FC)). On the set of facts and circumstances before the court, the favourable inference that the appellant had no knowledge about the content of the bag ought to have been drawn. Call him whatever, an obedient servant, an errant boy or a messenger boy of CKW, the appellant picked the bag from the car boot at the behest of the said CKW. His conduct being smooth and without hesitation as the learned trial judge had found, was more consistent with innocence.

[20] We now consider the appellant's other ground of appeal, on the failure of the learned trial judge to appreciate the defence. Beside himself giving evidence on oath, the appellant had also

called two other witnesses to support his defence, an officer from the Suruhanjaya Syarikat Malaysia (SSM) and an officer from the Simpang Renggam detention centre.

[21] The gist of the appellant's defence was that he went to the place of incident to meet CKW to seek for an employment as an assistant mechanic. Before that, he had stopped to buy some clothings for his children. After discussing about his employment and before he left, CKW requested him to fetch a bag in a Volvo car at the basement parking area and to hand it over to him at his waiting place near the auto pay machine at P2. Upon reaching the parking area and finding the car, the appellant opened the door at the driver's side to look for the lever to open the boot but was unable to find it. He then closed the door and opened the boot with the key which was given to him by CKW earlier. Upon opening the boot, he saw a paper bag but before he could fetch it, the police came and arrested him. He told the police that the bag belonged to CKW and he was asked to fetch it. He also told the police where CKW was waiting.

[22] SD2, Cik Aimi Mas'ad bt Yusuf, an officer from the SSM tendered exh. D22 which was a company returns from a company named Malaysian Vehicle Body Works Sdn Bhd. The evidence of SD2 corroborated the appellant's evidence about his application for job with CKW in the latter's workshop known as Malaysian Vehicle Body Works Sdn Bhd and that CKW's sister was the boss in the workshop.

[23] SD3 was a Penguasa Penjara, Pusat Pemulihan Akhlak, Simpang Renggam and he tendered exh. D23 and D24 which were detention order and suspension order under ss. 6 and 7 of the LLPK. The allegations of fact against CKW in the detention order (exh. D23) states:

> 1. Bahawa kamu didapati terlibat dengan aktiviti pengedaran dadah jenis Syabu yang mengandungi dadah berbahaya jenis Methamphetamine di antara pertengahan bulan Mei 2010 hingga 22.08.2010 di sekitar IKEA dan The Curve, Mutiara Damansara, Petaling Jaya, Selangor.
>
> 2. Bahawa kamu didapati mengedar dan menjual dadah jenis Syabu yang mengandungi dadah berbahaya jenis Methamphetamine dalam bentuk 100 gram, 250 gram dan 3,000 gram.

[24] Learned counsel submitted that these allegations of fact relates to the date and time where the appellant was arrested at the IKEA basement car park on 22 August 2010. The type and amount of drugs being methamphetamine and 3,000g in weight fit neatly with the evidence of the prosecution's case. Exhibit P10, a police report lodged by SP2 states that the amount of drug seized was 3,000g and not 30,000g as reported earlier.

[25] Upon her consideration of the defence, the learned trial judge had found:

> … Jika diteliti, didapati sememangnya cerita Tertuduh adalah tidak munasabah, tidak boleh diterima akal dan tidak lojik …

and gave reasons that it was illogical for the appellant to buy clothes and send them to Indonesia considering that he had been in and out of Malaysia from Indonesia for 41 times within a period of more than four years. The appellant had no work permit and that being a contract worker and having no experience as a mechanic how could the appellant have applied for a job as an assistant mechanic from CKW. The trial judge also found it illogical for CKW to come to IKEA to meet the appellant instead of the appellant going to see him at his office in Salak Selatan.

[26] Learned counsel for the appellant submitted that the learned trial judge had failed to consider what the core of the appellant's defence was, that is, it was CKW who requested the appellant to go to the car and pick the bag to be handed over to him and that CKW was the real trafficker. The trial judge had failed to appreciate that CKW was not a fictitious person. He was detained under the LLPK for activities relating to drugs. The allegations of fact against him fit very neatly with the time and type of drugs for which the appellant was being charged. The conduct of the appellant being smooth and without hesitation was consistent with his innocence. The appellant was not at all familiar with the car. He had to search for the lever at the driver's seat to open the boot and could not find any. We know that it is normal for many types or make of cars to have the lever to open the boot located at the side of the driver's seat. It could very well be true that CKW was the real trafficker. The story of the appellant was at the very least, probable.

[27] A judge hearing the defence, need not be unduly concerned about the truth of the defence but must consider whether the defence story is probable and has raised a reasonable doubt on the prosecution's case. The time tested case of *Mat v. Public Prosecutor* [1963] 1 LNS 82; [1963] MLJ 263 has always been the guiding principle which magistrates and judges had been following.

[28] There are evidence that spoke in favour of the appellant in his defence and those evidence, had it been properly appraised and appreciated by the learned trial judge, are consistent with the defence of the appellant. The failure of the trial judge to do so is a misdirection.

[29] It was further submitted by the appellant's learned counsel that the prosecution in the instant case had failed to rebut the defence case that it was CKW who was the real trafficker. The appellant was an innocent carrier who had no knowledge about the drugs in the car boot. He was only told to pick up a bag from the car boot. Notice of such was given to SP2 as early as when the appellant was arrested and evidence was led during the cross-examination of SP2 on the arrest of this person. SP2 had admitted so.

[30] The Federal Court in *Alcontara Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705 at p. 709 had among others stated:

> ... the onus was on the prosecution to check whether the appellant's version of the facts, as they appeared in his cautioned statement and to which we have referred, was true or false. In other words, the onus was upon the prosecution to disprove this important part of the appellant's version of the facts.

(See also: *PP v. Chia Leong Foo* [2000] 4 CLJ 649; [2000] 6 MLJ 705).

[31] A similar sentiment was again expressed by the Federal Court speaking through James Foong FCJ in *Aedy Osman v. PP* [2011] 1 CLJ 273 at p. 283:

> ... it is incumbent upon the prosecution to call evidence to rebut any claim which is relevant and material by the defence in the course of cross-examination of the prosecution witnesses than risking dismissal of its case for want of proof.

[32] In *Aedy Osman*, the Federal Court also stated that if there is evidence adduced to demonstrate that someone else rather than the accused was the real trafficker, then the trial judge should give due consideration to this before arriving at a decision to convict the accused, citing *PP v. Iskandar Mohamad Yusof* [2006] 6 CLJ 379, *Chow Kok Keong v. PP* [1998] 2 CLJ 469 and *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773.

[33] We are of the view that the learned trial judge had not sufficiently considered and appreciated the defence. We do not think a maximum evaluation of the defence evidence had been undertaken by the learned trial judge in the circumstances of the case. The defence evidence must be considered to re-evaluate the prosecution's case at the conclusion of the case. This, we found had not been done. We agree with Encik Hisyam's submission that the learned trial judge had not appreciated the appellant's core defence that the real trafficker was this other person in the name of CKW.

[34] On the grounds submitted before us, we find the conviction of the appellant to be unsafe. This appeal is allowed and the conviction and sentence set aside. The appellant will walk a free man. He is hereby acquitted and discharged.